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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 714

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

—v.—

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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1. Most of the respondents' Brief in Opposition consists of an attempt to litigate on its merits in this Court the defense of estoppel which petitioner has sought to assert. We shall not join respondents in this effort; our position is simply that the Adjustment Board should have permitted petitioner to have had the defense of estoppel considered on its merits before it, and that its refusal to do so was the sort of action which was open to correction by the Federal courts in the judicial review proceedings—however limited those judicial review proceedings might be.

Certainly there can be no question, despite the extremely selective statement of facts supplied by respondents, that respondent Hodges claimed, and submitted proof on, a permanent disability in his FELA suit. His complaint claimed that he was and is "totally and permanently dis-

abled from railroading."[1] (R. 68) It is hard to see why he should not be taken at his word. Neither is it true, as claimed (Br. in Opp. 2-4), that there was no medical evidence in support of this claim at the trial. Hodges' physician testified: "I doubt that he [Hodges] will ever be able to return to the type railroad yard work that he once did." (R. 58) Hodges also supported his contention with his own evidence of permanent disability. (R. 55) Moreover, Hodges introduced mortality tables into evidence; obviously these relate only to a permanent disability; and the court charged the jury on permanent disability and on the use of the mortality tables which Hodges had introduced. (R. 61-63) To say now that Hodges—a trainman—was not permanently disabled because he could have been assigned sedentary work (Br. in Opp. 3) is to ignore the facts of life in the railroad industry; there is no showing that Hodges had any seniority or qualification for any such work or that his craft in any way related to it. Despite these suggestions of the respondents, it is clear that there was created an occasion for the Adjustment Board to have considered whether the railroad had established an estoppel against Hodges on the basis of his FELA verdict on his permanent disability claim.

2. Despite the assertion of respondents, petitioner is not attempting to obtain judicial review of the Adjustment Board's rulings on a question of law (Br. in Opp. 8-11), or "trying to relitigate issues decided by the Board." (Br. in Opp. 7) Rather, petitioner is attempting to have the federal courts require the Adjustment Board to pass

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[1] In the light of this we are baffled by respondents' assertion that "plaintiff did not claim in his suit that he was totally and permanently disabled from railroading." (Br. in Opp. 12) This assertion flatly contradicts the record.

on and decide a legal defense which petitioner has tendered and which the Board has refused to consider. The Court of Appeals recognized (Pet. App. 10a-11a) that the action of the Adjustment Board in not considering the claim of estoppel was without foundation. Yet it declined to do anything about this, and instead ordered the District Court to enforce the award which had been made on this basis. It is this precise point which we are seeking to have this Court review, since it represents an abdication of all judicial review over the Adjustment Board's rulings.—While we cannot agree with respondents (Br. in Opp. 9-11) that Public Law 89-456 is applicable to awards rendered before its passage, nonetheless, as we pointed out in the Petition for Certiorari (Pet. 16-18), even if Public Law 89-456 were applicable, its legislative history makes it plain and confirms that the federal courts are to "have the power to decline to enforce an award which was actually and indisputably without foundation in reason or in fact." S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3. It is precisely in this category that the Adjustment Board's action here, in declining to consider a meritorious defense, falls.

3. Finally, the respondents claim (Br. in Opp. 4-5, 7-8) that the Adjustment Board declined to consider the defense of estoppel because the petitioner had not afforded Hodges an "investigation" under the Union contract; apparently it is suggested that somehow this was a failure to exhaust the petitioner's remedies and that the failure to afford Hodges an investigation precludes the petitioner from claiming estoppel. But on its face the Adjustment Board's award (Pet. App. 30a-31a) does not proceed on this basis; it is based simply on the alleged nonidentity of parties as between the FELA suit on the one hand and the proceeding before the Adjustment Board on the other. Secondly,

the Adjustment Board made it perfectly plain that it did not view the issues before it as limited to whether the petitioner was in the wrong in not affording Hodges an investigation; for the Adjustment Board expressly held that Hodges could not return to work until a factual determination was made that he was "physically able to return to work" (Pet. App. 31a); for the determination of this issue, the Board from the start ordered a physical examination, and then later, as required by the first opinion of the Court of Appeals, itself made a factual determination of Hodges' physical condition. (Pet. App. 37a-38a) But Hodges' physical condition was the very issue to which the claimed estoppel related. As the respondents point out (Br. in Opp. 7), if their theory were correct as to the basis on which the Board is claimed to have refused to consider the estoppel, the issue of whether Hodges were disabled would not have been before the Board; but clearly it was, as the Board itself recognized by ordering the physical examination. Accordingly, it is plain that, as the Court of Appeals found, the Adjustment Board was without justification in refusing to consider the claim of estoppel on its merits—either on the ground which respondents now seek to ascribe to the Board, or on the Board's stated grounds, by which its decision must be judged.

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this Reply Memorandum, the Petition for Certiorari should be granted.

Respectfully submitted,

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